United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 15, 2010

S.A.M.
TO : Timothy W. Peck, Acting Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Clinton Reilly Holdings
Case 20-CA-34356
And
National Union of Healthcare Workers — 518-4030-0100
Case 20-CB-13257 — 518-4030-9000
536-2570
536-2574

These cases were submitted for advice as to whether the Employer and the Union violated Section 8(a)(2) and 8(b)(1)(A) of the Act, respectively, where the Employer's owner created and helped operate a non-profit fund that provides financial and other support to the Union, and the Union does not represent or seek to represent the Employer's employees. We conclude that the instant cases would not be an appropriate vehicle with which to present the Board the novel issue of whether Section 8(a)(2) prohibits an employer from assisting a union that does not represent its employees nor seek to represent them, and that it would not effectuate the purposes and policies underlying the Act to issue complaint in the particular circumstances here.

FACTS

These cases are related to the conflict between the Service Employees International Union (SEIU) and the SEIU-affiliated United Healthcare Workers West (UHW), which culminated in SEIU placing UHW in trusteeship on January 27, 2009. The next day, the former principal officers of UHW formed National Union of Healthcare Workers (NUHW or the Union).[1]

Clinton Reilly Holdings (the Employer) is a real estate management company owned and operated by Clinton Reilly. In addition to his building ownership and

[1] For a fuller factual summary of those events, see our memorandum in SEIU, United Healthcare Workers – West (UHW) & 10 Named Business Agents & National Union of Healthcare Workers (NUHW), Case 20-CB-13223, et al., also issued today.

management enterprises, Reilly recently opened "Credo," an upscale Italian restaurant in downtown San Francisco.

Reilly is also active in politics -- he has been a political consultant, a candidate for public office, and he writes a regular newspaper column on political subjects. A column Reilly wrote in May 2008, "The Battle for Labor's Soul," strongly supported UHW and its then-president Sal Rosselli in their struggle with SEIU and its then-president Andy Stern. In the article, Reilly voices his support for the organizing tactics of UHW under Rosselli and argues that UHW's method of organizing will be more successful than SEIU's in helping reverse the decline in union membership.

Most of Reilly's corporate enterprises are headquartered at the Merchants Exchange Building (MEB) in San Francisco, which is also owned and operated by the Employer. At MEB and other buildings, the Employer directly or indirectly employs at least a small number of janitors and other maintenance staff. Some of these employees are represented by unions, including SEIU affiliates, but none of the Employer's employees have ever been represented by UHW or NUHW.

During the summer of 2008, Reilly suggested to his friend Sal Rosselli, then-President of UHW, that Reilly start a fundraising effort to help defray Rosselli's legal and other expenses related to UHW and Rosselli's ongoing dispute with SEIU. In September 2008, Reilly established the Fund for Union Democracy and Reform (FUDR) to raise such funds. FUDR is headquartered in the MEB and does not pay rent for the space, nor does it pay for utilities or any other building expenses. At its formation, FUDR was registered as a tax-exempt "public benefit" corporation with the State of California.

Reilly is CEO and President of FUDR. FUDR's Secretary and CFO is Charlie Ridgell, who worked as a division director of UHW until FUDR was incorporated.[2] Day-to-day operations of FUDR are administered by current NUHW Administrative Vice President Dan Martin, as a volunteer, along with a number of other current NUHW officials, also as volunteers. While Martin has stated that he maintains FUDR's books and decides its expenditures, only Reilly and Ridgell have the authority to sign FUDR checks, which Reilly often signs or co-signs.

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[2] SEIU has asserted that Ridgell continued to work as a "key NUHW operative" after he came to FUDR.

In November 2008, FUDR held its first fundraising event, for the stated purpose of honoring Sal Rosselli and the 150,000 members of UHW. The event was held at the Julia Morgan Ballroom at the MEB, which rents for a minimum of $8,500 (according to MEB's website). The invitation/announcement for the fundraiser named the event's "Committee,"[3] and listed ticket prices ranging from $25 to $2500. The invitation/announcement promised contributors anonymity. Interested parties were directed to contact Joanne Maher at clintonreilly.com.[4]

In December 2008, counsel for FUDR wrote to the California Attorney General, asserting that FUDR had been mistakenly created as a tax-exempt "public benefit" corporation (a status that was incompatible with FUDR's intended purpose of providing financial support to UHW's leadership in its fight against SEIU). FUDR counsel requested approval to convert its corporate registration to a "mutual benefit" corporation, which would allow such funding activities. The December letter represented that FUDR had "no assets" and no plan for distribution. The California Attorney General granted FUDR's request and permitted the conversion in January 2009.[5]

On January 28, Rosselli and other removed former officers of UHW announced the formation of NUHW, stating

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[3] The "Committee" included statutory employers, none of whom appear to directly employ employees that UHW or NUHW represents or seeks to represent. Two of the employers on the "Committee" have a connection with the health care industry. One owns a public relations and consulting firm which has clients in the healthcare industry, including hospitals employing employees represented by UHW. This individual purchased a $250 ticket for the November 2008 event with a company check. The other was a former elected state official who became a healthcare policy consultant for a group of employers that includes at least one employer with employees represented by UHW. There is no evidence that this individual contributed any money to FUDR or NUHW.

[4] Reilly claims that Maher is an independent contractor event planner, and that she was not an employee of Clinton Reilly Holdings or any of his other corporate ventures at the time of the November 2008 fundraiser. There is no evidence as to whether Reilly or any other employer paid Maher or guaranteed her payment for the November 2008 fundraiser.

[5] All dates hereinafter are in 2009, unless otherwise noted.

that NUHW would immediately begin organizing health care workers.

In February, counsel for FUDR informed the California Attorney General that FUDR in fact did have substantial unspent assets -- it claimed a cash balance of over $82,000 remaining from approximately $190,000 generated by the November 2008 fundraising event. FUDR reported no other income at that time. FUDR counsel further explained that conversion to a "mutual benefit" corporation would give FUDR "greater flexibility to contribute any Mutual Benefit Assets to an exempt labor organization or other organizations working on issues related to healthcare workers."

In March, the California Attorney General approved the change in registration, on the condition that FUDR segregate all funds obtained prior to the conversion and expend such restricted assets only for public benefit purposes. In September, the California Attorney General requested documentation verifying FUDR's compliance with the conditions on segregation and use of restricted assets. In response, in October, counsel for FUDR submitted a report of FUDR's spending of the money it raised in November 2008. FUDR's reported expenditures included: approximately $42,000 to pay for printing and copying charges at Kinko's on January 28, the date of the announcement of NUHW's formation, which the parties agree paid for decertification petitions and dues checkoff authorization revocations for the newly-formed NUHW; $37,000 to pay legal expenses of Sal Rosselli and other UHW officials; several thousand dollars to pay for various other expenditures made directly on NUHW's behalf, including for NUHW's trademark registration, postal permit and fees, printing and copying charges, rental fees, and other organizing-related expenses; and approximately $4,400 to pay for the security deposit and first two months rent for what would become NUHW's office.

FUDR's website refers to no issues other than those related to NUHW, and NUHW is the only listed recipient of FUDR's funding. FUDR's website currently solicits donations, with a disclaimer that it does not accept contributions from healthcare employers; contributors must check a box certifying that they are not a health care employer. The disclaimer was added sometime after the instant charges were filed. It further states that contributions are not tax deductible and that all contributors shall remain anonymous. No evidence has been adduced indicating how much money FUDR has raised through its website, or through several other fundraising events similar to the November 2008 event.

NUHW's website also solicits donations through FUDR. If visitors to NUHW's website are healthcare workers, they are encouraged to join NUHW; if not, they are told that they may nevertheless support the work of NUHW by making donations to FUDR. A hyperlink to the FUDR website's contributions page is provided. Clinton Reilly states that it was his idea to link the two websites.

FUDR has refused to provide its financial records in the investigation of these cases. Thus, we have little evidence as to who contributed through the November 2008 fundraiser, or to FUDR at any other time. There is no evidence that the Employer or Clinton Reilly personally contributed any money directly to FUDR or NUHW, although the Employer provided the ballroom for the November 2008 fundraising event and rent-free office space for FUDR. We also have no evidence as to the nature and amounts of FUDR's expenditures, other than those that were included in FUDR's filing with the California Attorney General, discussed above.

In March 2010, NUHW filed its LM-2 "Labor Organization Annual Report" for 2009. It did not report any contributions or receipts from FUDR. It reported total receipts of more than $3,500,000, primarily from other labor organizations, including $2,000,000 in outstanding loans from other labor organizations.

NUHW's Constitution & Bylaws, Article 3, "Jurisdiction," states that "[t]his Union shall have jurisdiction over all healthcare workers who are eligible for membership, as well as other workers who believe it is in their best interest to join with the National Union of Healthcare Workers." In addition to employees of strictly health care employers, NUHW has sought to represent employees engaged in janitorial, maintenance, security, housekeeping, environmental services, food preparation, food service and cleanup for non-health care employers operating at health care facilities, including such firms as Sodhexo, Compass/Crothall, and Aramark. There is no evidence that NUHW has sought to represent any non-health care employees who are not employed at health care facilities.

SEIU contends that the leaders of NUHW, while they were officials of UHW, took actions attempting to undermine and remove from office several SEIU-affiliated union leaders, including Mike Garcia, the president of SEIU Local 1877 and leader of SEIU United Service Workers West, SEIU's major presence in the California general property services sector. SEIU points out that Garcia and Local 1877 have

had a longstanding collective-bargaining relationship with the Building Owners and Maintenance Association (BOMA) of San Francisco, of which the Employer is a member. In addition, SEIU notes that NUHW has sought to represent food service workers at health care facilities, and that Clinton Reilly is engaged in food service at his Credo restaurant in downtown San Francisco and at the Julia Morgan Ballroom at the MEB.

On March 5, SEIU filed the charges in the instant cases, alleging that Clinton Reilly Holdings violated Section 8(a)(1) and (2) of the Act by interfering with the administration of UHW and NUHW by contributing financial or other support to those labor organizations, and by dominating or interfering in the formation of NUHW; that NUHW violated Section 8(b)(1)(A) of the Act by accepting financial and other forms of support from Clinton Reilly Holdings and other statutory employers; and that, due to NUHW's reliance upon such support, NUHW is an employer-dominated labor organization that should be disestablished.

ACTION

We conclude that the instant cases would not be an appropriate vehicle with which to present the Board the novel issue of whether Section 8(a)(2) prohibits an employer from assisting a union that does not represent its employees nor seek to represent them, and that it would not effectuate the purposes and policies underlying the Act to issue complaint in the particular circumstances here. Thus, the limited membership scope of NUHW, the attenuated nexus between the Employer's employees and NUHW, and the lack of any evidence of an improper motivation behind the Employer's support for NUHW make this case a poor vehicle for presenting this novel issue to the Board.

Initially, we note the broad statutory language of Section 8(a)(2), which makes it an unfair labor practice "for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it" (emphasis added).[6] Thus, the plain language of the statute arguably

[6] It is well settled that a union violates Section 8(b)(1)(A) by accepting financial or other support that is unlawful under Section 8(a)(2). See, e.g., Freeman Decorating Co., 336 NLRB 1, 14 (2001); Pacific Amphitheatre, 276 NLRB 32, 42 (1985); Jackson Engineering Co., 265 NLRB 1688, 1690, 1704 (1982). See also Int'l Ladies' Garment Workers v. NLRB (Bernhard-Altmann), 366 U.S. 731, 738 (1961).

supports finding a violation whenever any employer provides financial support to any union. The statutory language does not expressly limit the employers and unions to which it might be applied. The broad "any labor organization" language of Section 8(a)(2) stands in contrast to other, more narrowly confined statutory provisions that require an employment relationship between employers and the employees represented by the labor organizations at issue, such as Section 8(a)(5) of the Act (imposing on an employer a duty to bargain with "the representatives of his employees") or Section 302(a) of the Act (prohibiting employer payments to "any representative of any of his employees," "any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer," and "any employee or group or committee of employees of such employer") (emphasis added). Indeed, it might be argued that, given that such specificity was enacted elsewhere, the absence of any limiting language in Section 8(a)(2) suggests that Congress intended this statutory provision to apply broadly, similar to Section 8(a)(1), which requires no showing of an employment relationship between the wrongdoing employer and the affected employees.[7]

Moreover, there is no Board or court precedent limiting the application of Section 8(a)(2), and it might be argued that the policy basis for protecting employees' choice of bargaining representative from interference by employers may be implicated where an employer contributes financial or other support even to a labor organization that does not represent the employer's own employees, and does not currently seek to represent them. In enacting Section 8(a)(2), Congress acknowledged that dues, not employer contributions, were the source of union funds and arguably suggested that financial aid by employers generally impinged upon employees' self-organization rights.[8] This latter concern is arguably implicated by the

[7] See, e.g., Hudgens v. NLRB, 424 U.S. 507, 510 n.3 (1976) ("The Board has held that a statutory 'employer' may violate 8(a)(1) with respect to employees other than his own."); Int'l Shipping Ass'n, 297 NLRB 1059, 1059 (1990); (the Board consistently has held that an employer under Section 2(3) of the Act may violate Section 8(a)(1) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship).

[8] See Senator Walsh (Chairman of the Senate Committee on Education and Labor) on S. 2926, 78 Cong. Rec. 10559, reprinted in 1 Leg. Hist. NLRA 1122, 1125 ("We reached the conclusion that financial support in some instances was an

financial assistance, support, or domination of a labor organization by any employer, even in the absence of a direct employer-represented-employee relationship. Further, nothing in the legislative history expressly limits the scope of Section 8(a)(2) to assistance or domination of a union that represents the employees of the particular assisting or dominating employer, or that currently seeks to represent them.

On the other hand, we are aware of no Board case or other authority that has found a violation of Section 8(a)(2) where the assisted or dominated union does not represent or seek to represent the employees of the assisting or dominating employer. Nor have we found cases that have otherwise addressed whether such a violation might be found. In addition, while the legislative history, as noted above, provides some support for the argument that an employer violates Section 8(a)(2) by contributing to a union that does not represent or seek to represent the employer's employees, Congress' overriding purpose in enacting Section 8(a)(2) was to address the problem of employers using "company-dominated unions" as a tool to thwart legitimate organizing efforts among their own employees. Most of the legislative discussion was devoted to addressing the problem of company-dominated unions.[9]

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abuse and did deny that freedom and independence which employees in organizing for their mutual welfare should enjoy." "National trade unions do not seek financial support from employers. They rely upon the dues paid by their members to maintain their organizations and cover the expenses of administration, and this is one of their reasons for opposing financial aid from employers"); H. R. Rep. No. 74-969, at 15 (1935), reprinted in 2 Leg. Hist. NLRA 2910, 2925 ("It is of the essence that the right of employees to self-organization and to join or assist labor organizations should not be reduced to a mockery by the imposition of employer-controlled labor organizations . . .").

[9] See, e.g., S. Rep. No. 74-573, at 10 (1935), reprinted in 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 2300, 2309-2310 (1985) ("The so-called 'company-union' features of the bill are designed to prevent interference by employers with organizations or their workers that serve or might serve as collective-bargaining agencies. . . . It is impossible to catalog all the practices that might constitute interference, which may rest upon subtle but conscious economic pressure exerted by virtue of the employment relationship"); H. R. Rep. No. 74-969, at 16 (1935), reprinted in 2 Leg. Hist. NLRA 2910,

We need not, however, decide the precise parameters of Section 8(a)(2) in the instant cases, as we conclude that it would not effectuate the purposes and policies underlying the Act to issue complaint here. First, because NUHW's membership appears to be entirely confined to health care employees and non-health care employees working at healthcare facilities, it is unlikely that NUHW will ever represent or seek to represent the Employer's employees. While, we recognize that NUHW's Constitution & Bylaws maintain the possibility that NUHW might seek to represent employees with no health care connection, and NUHW has sought to represent some non-health care employees working at health care facilities, NUHW currently discourages non-health care employees from joining via its website. Further, NUHW has not sought to represent any non-health care employees not employed at health care facilities, nor is there any evidence that it is likely to do so in the near future. And, significantly, neither Clinton Reilly Holdings nor Clinton Reilly himself has any business interests in the health care sector.[10]

Second, no evidence here indicates that Reilly was motivated by any improper "company union" or "sweetheart deal" object typically found in Section 8(a)(2) cases. Indeed, no evidence indicates that Reilly had any self-interested or business-related object whatsoever. Rather, all of the evidence indicates that Reilly was motivated to form FUDR and assist UHW and NUHW by his long-term friendship with Rosselli and his publicly-avowed political support for UHW/NUHW. Reilly clearly supported one side in the struggle between these two union entities that he referred to in his newspaper column as "the Battle for Labor's Soul," but there is no evidence that he personally,

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2925 ("Collective bargaining is reduced to a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals").

[10] We recognize that that NUHW has sought to represent food service workers and janitors at health care facilities, and that Clinton Reilly is engaged in food service at his Credo restaurant in downtown San Francisco and at the Julia Morgan Ballroom at the MEB and directly or indirectly employs janitors. Given the differences between health care food service and the non-health care restaurant and ballroom catering settings, however, as well as the differences between health care and non-health care employment settings generally, this provides a tenuous, largely semantic, connection between the Employer and any employees likely to ever be represented by NUHW.

or his business interests generally, stood to gain anything by such support.

In particular, there is no indication that the collective-bargaining relationship between BOMA (of which the Employer is a member) and Mike Garcia (the president of SEIU Local 1877) played any part in Clinton Reilly's decision to assist Rosselli, the former leaders of UHW, or NUHW. We recognize that the former UHW leaders sought to undermine and remove Garcia from office, along with other SEIU-affiliated local union leaders, as part of UHW's internal union struggle within SEIU. There is no indication, however, that they did so because Garcia was negotiating with BOMA, or that this conduct was in any way a factor in Clinton Reilly's decision to provide them with assistance. Rather, as set forth above, Reilly's motives appear to be personal and political, rather than business or financial.

Finally, we note that the evidence does not indicate that NUHW is dominated by the Employer, FUDR, or Clinton Reilly himself. Although Section 8(a)(2) does not define the specific acts that may constitute domination, a labor organization that is the creation of management, whose structure and function are essentially determined by management, and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under Section 8(a)(2).[11] Here, no evidence indicates that Clinton Reilly or any other employer had any input at all into the creation, formation, or structure of NUHW. Further, NUHW's LM-2 indicates that it received a majority of its reported operating funds from other labor organizations, not from FUDR. Thus, because NUHW was not created by an employer, the union and its members independently determined its formulation and structure as an organization, and it is not wholly dependent on an employer for its continued existence, it is not an employer-dominated labor organization.

In all these circumstances, we conclude that the instant cases would not be an appropriate vehicle with which to present the Board the novel issue of whether an employer can contribute financial support to a labor organization that does not represent or seek to represent

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[11] See, e.g., Electromation, Inc., 309 NLRB 990, 995-996 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994), citing Pennsylvania Greyhound Lines, 1 NLRB 1 (1935), enf. denied in part 91 F.2d 178 (3d Cir. 1937), revd. 303 U.S. 261 (1938).

the employer's employees, and that it would not effectuate the purposes and policies underlying the Act to issue complaint here.[12]

Accordingly, the Region should dismiss the charges in the instant cases, absent withdrawal.

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[12] We also would not issue complaint based on the limited assistance provided to FUDR by the two individuals for whom there is evidence of a connection to health care employers. Neither of these individuals are named in the charges in the instant cases, and the only evidence in the record of any assistance by either of them occurred in November 2008, long before the formation of NUHW, the only Charged Party Union here.